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Nos. 111 and 122

In the Supreme Court of the United States

OCTOBER TERM, 1959

MAX SCHAFFER AND NORMAN SCHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA

HYMAN KARP AND BENJAMIN T. MARCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 104)[1] is reported at 266 F. 2d 435. The opinion of the District Court denying the pretrial motion of petitioner Karp for a severance is reported at 158 F. Supp. 522.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 118). A petition for rehearing

[1] "R." refers to the printed record; "Tr." refers to the typewritten transcript lodged with this Court.

was denied on May 18, 1959 (R. 119). The petition for a writ of certiorari in No. 111 was filed on June 11, 1959, and the petition in No. 122 was filed on June 17, 1959. The petitions were granted on October 12, 1959 (361 U.S. 809). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was proper joinder of offenses and defendants as between substantive counts of an indictment so as to permit their proper submission to the jury after the dismissal of a conspiracy count initially charged in the same indictment.

2. Whether the values of individual shipments of stolen goods shipped in interstate commerce to each petitioner were properly aggregated under 18 U.S.C. 2311 and 2314.

3. Whether remarks made by the Assistant United States Attorney on summation, in reply to a defense argument implying a government "deal" in the suppression and control of testimony, were improper.

STATUTES AND RULES INVOLVED

18 U.S.C. 2314 provides, in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2311 provides, in pertinent part:

> As used in this chapter:
>
> * * * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> *Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by

such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

In a trial before a jury in the United States District Court for the Southern District of New York, the petitioners were convicted on separate substantive counts of an indictment charging violations of 18 U.S.C. 2314 for transporting, in interstate commerce, goods of a value in excess of $5,000 known to have been stolen (R. 64a). The petitioners Max and Norman Schaffer, and Hyman Karp were each sentenced to imprisonment for two years and to pay a fine of $10,000. The petitioner Benjamin T. Marco was sentenced to imprisonment for four years and to pay a fine of $10,000 (R. 69a).[2] The court of appeals affirmed.

I

JOINDER

A. THE INDICTMENTS

The indictment was drawn in four counts (R. 5a-7a). Count 1 charged the two Schaffers, together with Anthony, Mario and Dorothy Stracuzza, with transporting stolen merchandise, consisting of ladies'

[2] Two other defendants named in the indictment, Anthony and Mario Stracuzza, who had entered pleas of guilty prior to trial, were each sentenced to imprisonment for five years on this and two other indictments, the sentences to run concurrently and to be suspended (R. 69a). A seventh defendant, Dorothy Stracuzza, was granted a severance as to trial and the charges were dismissed thereafter.

and children's wearing apparel, from New York to Lebanon, Pennsylvania, during the period May 15, 1953 to July 27, 1953. Count 2 charged Benjamin T. Marco and the Stracuzzas with a similar movement of like goods from New York to Bluefield, West Virginia, from June 11, 1953 to July 27, 1953, and Count 3, charged Hyman Karp and the Stracuzzas with transporting such goods to Fall River, Massachusetts, from May 21, 1953, to July 27, 1953. The fourth count charged all the parties with a conspiracy to commit the substantive offenses (R. 6a). A second indictment, under which the petitioners went to trial at the same time, alleged in a single count a conspiracy of all the named parties to violate 18 U.S.C. 659 by receiving and concealing goods stolen in interstate commerce.

Prior to trial, the petitioner Karp moved for a severance on the ground that he would be prejudiced by being tried with Anthony and Mario Stracuzza (who had at that time entered pleas of guilty to a separate indictment) and with Benjamin T. Marco (who had a criminal record). The motion was denied. *United States* v. *Stracuzza*, 155 F. Supp. 522 (S.D.N.Y.).

B. THE EVIDENCE

The evidence, insofar as pertinent here, was as follows:

1. Anthony Stracuzza, the principal government witness, testified that, in 1952, he had worked in the offices of Eisenberg and Berk, and later, in early 1953, in an association with Mr. Berk alone, where he handled wearing apparel. Truck drivers would bring in

quantities of packaged apparel and loose garments to the offices. Mr. Stracuzza would change the tags on the loose dresses and deliver them to various customers in the garment area. All children's wear was resealed in boxes and addressed to be delivered by express to a Mr. Karp in Fall River, Massachusetts (R. 22–23, 31). It was in the Eisenberg offices that Mr. Stracuzza, in 1952, first met the petitioners. He saw them all come in at various times. He saw them examine for selection the merchandise which the truck drivers had brought in as well as the invoices that accompanied the deliveries. The Schaffers came in every week or ten days (R. 39–40). On one occasion they were there at the same time as Mr. Karp (R. 100). Mr. Marco came in once during this period; he picked out certain merchandise which Mr. Stracuzza immediately packed for express to Bluefield, West Virginia (R. 21–22, 29). In May 1953, Anthony Stracuzza, assisted by his brother Mario, opened up his own place of business under the name A. Shaffer (R. 46). They would buy packages of merchandise from truck drivers in the garment district (R. 50, 51). In May, Anthony Stracuzza accosted the Schaffers as they were leaving the Eisenberg offices. He told them he was in business for himself, that he would like to do business with them, and that he could give them good merchandise. Shortly thereafter, the Schaffers came to Mr. Stracuzza's office and examined the merchandise and the manufacturer's bills (R. 55–56). The Schaffers agreed to pay 65% of the manufacturer's invoice price (R. 52). From this time until July 28, 1953,

they came in every week or ten days to examine merchandise, preferably coats, suits and dresses, and the accompanying manufacturers' invoices (R. 54–55, 57). The merchandise was sent to Lebanon, Pennsylvania, through U.S. Packing and each package included, not only Mr. Stracuzza's bill, but the manufacturer's invoice. It was Mr. Stracuzza's practice to copy all the information on the manufacturer's invoice as to style, quantity, etc., on his own bill. As to the manufacturer's bill he would cut off the name of the consignee, leaving the manufacturer's name on the bottom of the invoice (R. 59–62).

In May, Mr. Stracuzza also called Mr. Karp, and offered to do business with him. After some wrangling over prices, it was agreed that Mr. Karp would pay 55% of the manufacturer's price listed on invoices to be sent with the shipments (R. 52–53, 60). Mr. Karp said, "You can start shipping" (R. 53). From this time until July 28, 1953, merchandise was shipped to Mr. Karp in Fall River, Massachusetts, by Railway Express. Each package included the manufacturer's invoice (R. 47, 53, 61). At one time Mr. Karp telephoned from Fall River to ask Mr. Stracuzza if he had protection in New York (R. 68–69).

In June 1953, Mr. Stracuzza called up Mr. Marco, identified himself as having worked with Eisenberg and Berk, and arranged to make sales to him. Mr. Marco said, "All right, you can start sending" (R. 48). Thereafter until July 28, 1953, merchandise was sent to Mr. Marco in Bluefield, West Virginia, by Railway Express. The price was 60% of the manufacturer's invoice which was always enclosed (R. 54–55,

61, 62). During this period Mr. Marco came to Mr. Stracuzza's place of business upon three occasions (R. 73). At times he complained about getting too much of one style or price range, and Mr. Stracuzza said that he could not break up the packages but sold them as he received them (R. 74–75).

Mr. Stracuzza identified records and checks showing the transactions with the various petitioners which formed the basis of the indictment (Tr. 408, 450–457).

2. Other testimony may be summarized briefly as follows:

F.B.I. agents testified as to surveillance made of the Stracuzza premises and their observations of cartons addressed to the petitioners (Tr. 830–833, 893).

An F.B.I. photographer, using a telescopic lens, took pictures of Max Schaffer on the Stracuzza premises between 11:15–12:15 on July 28, 1953 (R. 82–84). When Mr. Schaffer was apprehended there at 4 p.m. on the same day, he denied that he had ever done business or visited there (R. 87).

Agents testified that, on the day of Mr. Stracuzza's arrest, they recovered on his premises a number of original manufacturers' invoices and a sealed carton of merchandise addressed to Mr. Karp containing such invoices (Tr. 836). An agent testified that Mr. Karp had admitted that he had done business with "Tony" as well as Eisenberg and Berk (Tr. 1126–1131).

Employees of Mr. Marco testified that they cut labels from wearing apparel (R. 90) and sewed in labels (R. 92), and that the apparel was sold at much less than the price charged by other stores (R. 91).

Mr. Marco once said that the merchandise was stolen, but it was thought he was joking (R. 89–90).

Stipulations were entered into by each of the petitioners to the effect that manufacturers if called would identify the garments which they manufactured, and that various United States Marshals would testify that clothing in their possession was recovered from the various premises of the petitioners (R. 20a–21a; Tr. 1438–1444).

C. THE RULINGS

The conspiracy counts (*i.e.*, the separate indictment and count 4 of the present indictment) were dismissed at the close of the evidence at the trial, the court noting that the question would have been closer if there was a charge of separate conspiracies between each defendant and the Stracuzzas (R. 12a). Counsel for Mr. Karp then argued, in support of a motion to acquit, that the evidence introduced against the other defendants had resulted in fatal prejudice to him (R. 14a). The court noted that the evidence "can be very easily segregated" (R. 13a, see R. 14a). The court subsequently explained to the jury that the conspiracy count had been dismissed and that various exhibits and testimony admitted at first only against one defendant would be limited to that defendant (R. 19a–20a).

In his charge, the trial judge said (R. 50a–51a):

> Now, the posture of the case as it is being submitted to you today is, as I explained to you on Thursday, considerably different than when it started. The only questions that you are concerned with are the guilt or innocence of each defendant as they are separately charged

in Counts 1, 2 and 3 of the indictment, No. 145-232.

* * * * * *

You are limited, in fact you are required to consider the evidence against each defendant separately and as it relates to him under the particular charge of which he stands accused. That is, you are not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant. In short, even though there are four defendants on trial, as against each you must consider only the eveidence that relates to him; and not view it as a sum total of all the evidence merely because they are charged in one indictment and have stood trial together.

In affirming the convictions, the Court of Appeals held that there was proper joinder for trial at the outset of the proceedings, that this would not have been true but for the conspiracy count, but that the mere fact that the conspiracy count had been dismissed at the close of evidence was not ground for reversal in the absence of a showing of prejudice. It noted that the record revealed no basis for a claim of prejudice since the issues were not complex and a number of precautionary measures were taken to keep the issues as to each defendant separate (R. 112-115).

II

THE EVIDENCE AND CHARGE RELATIVE TO THE VALUE OF SHIPMENTS

Among the stipulations at the trial was the following, entered into by each of the petitioners in identical

form and substance (except as to applicable differences in place and date):

> It is hereby stipulated and agreed by and among the defendants Max Schaffer and Norman Schaffer, and their counsel, Irving W. Coleman, and the United States of America * * *
>
> * * * * * *
>
> 3. That the aggregate value of the merchandise consisting of ladies' wearing apparel, which was transported from the Southern District of New York to Lebanon, Pennsylvania, to the defendants Max Schaffer and Norman Schaffer, during the period from on or about May 15, 1953, up to and including July 27, 1953, was in excess of $5,000. Each shipment was a value of less than $5,000 [R. 20a–21a].[1]

The trial judge expressed concern as to the meaning of the provision of the statute that the jurisdictional amount could be based on the "aggregate value" of the merchandise referred to in an indictment (R. 16a). He was of the view that "the one indictment means the one charge, so that it is three separate counts relating to the three groups of defendants" (R. 16a). And, in that connection, the judge said he was going to assume the defendants were making a motion for a directed verdict of acquittal as to the substantive counts and was reserving decision on the motion (R. 18a–19a; see R. 21a).

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[1] For the stipulation by Benjamin T. Marco, see Tr. 1438, 1439; and for Karp, see Tr. 1440, 1441. The actual value of these shipments to the various petitioners totalled $19,531.52 to the Schaffers (Tr. 986), $17,175.24 to Karp (Tr. 1135), and $23,080.14 to Marco (Tr. 1066).

The court charged (R. 58a):

> One of the other elements of the crime charged against each defendant, and an important element, since without it the crime does not rise to the dignity of a federal crime, is that the Government must prove that the shipments of the stolen merchandise were in excess of $5,000. In this connection, the stipulation between the attorneys states that the total shipments covered by each count are in excess of $5,000. The statute that Congress passed says, "The aggregate value of all goods and merchandise referred to in a single indictment shall constitute the value thereof." This means that under each count addressed to each defendant and to the Schaffers jointly, you may rely on the stipulation, in so far as value is concerned, that the value of the goods and merchandise, exceeded the sum of $5,000, even though no individual shipment was of a value that high.

In affirming the conviction, the Court of Appeals noted that Congress intended to permit aggregation of a series of transactions. It said it need not decide what ruling should be made in a case where transactions are truly separate and distinct since here the proof made clear that as to each appellant there was a sufficient unity for the purpose of the statute (R. 109–110).

III

THE SUMMATIONS

In the summations to the jury, defense counsel argued the lack of proof of guilty knowledge. Counsel for the petitioner Karp, commenting upon evidence which he charged came from a tainted source, charac-

terized the government's main witness, Anthony Stracuzza, as a liar, a perjurer, a thief and a loan shark "who has made his peace with the Government, and who is determined to help the Government in any way he could, because that is the way he is going to help himself and his wife and his brother." (Tr. 1471–1472.) Noting that the government had arrested the wife, Dorothy, and the brother, Mario, of the witness, counsel inquired "Where were Mario and Dorothy in this case?" After objections to this line of argument were overruled by the court, counsel continued in part (Tr. 1472–1477):

> I say, where were Mario and Dorothy. * * * Dorothy was indicted in this case as a defendant. But before the trial the District Attorney severed the case, which means that she doesn't go on trial, and he admitted to you that in a previous indictment involving the three Stracuzzas and some thieves, he similarly severed the case, so she didn't have to appear there.
>
> That is a nice way to treat a lady—don't put her to any inconvenience. You don't put her on trial; you don't try her for the crimes she may be charged with by the grand jury; and when you don't call her to the witness stand, she is not cross-examined by these nasty defense lawyers, who want to ask embarrassing questions.
>
> * * * * *
>
> Is that one of the benefits that accrues to a witness for the government in this case, to have his wife [tenderly] dealt with?
>
> What other benefits accrue to such a witness? * * *

Why hasn't he been sentenced, ladies and gentlemen? Incidentally, Mario got the same treatment on the same occasion, at the same time. He came in, pleaded guilty to this indictment, pleaded guilty to the other indictment, and he hasn't been sentenced.

Why haven't they been sentenced, ladies and gentlemen? Is it because when you have a prospective witness and the sword of Damocles hangs over his head, it is then the power of the Assistant District Attorney to make a recommendation to the Court? Is it because when a witness has hanging over him the possibility of going to jail, that he bestirs himself a little more on behalf of the side that has that power?

I have no power to do anything here. I have no power to make recommendations to the Court. I won't be heard. But he has the power.

Apprising the jury of another crime of stealing of which Anthony Stracuzza had been convicted, counsel for Mr. Karp continued (Tr. 1482):

* * * He got a suspended sentence on the recommendation of a District Attorney who sits here. * * *

Now, that is nice treatment; that is nice treatment, and something anybody in his right mind would want, and it sheds a little more light on Mr. Stracuzza and his motives in testifying, and the weight you can give his testimony, and whether he was here to help you arrive at the truth, or whether he was here to fool you, to do anything he could so that he'd get his 30 pieces of silver.

The Assistant United States Attorney prefaced his summary with brief remarks addressed to these implications. He noted that Dorothy Stracuzza was still a defendant against whom charges were open, and that Mario Stracuzza had not been called by the Government for the reason that, since the testimony of an FBI agent confirmed that Mario and Anthony were interviewed on each and every occasion together and had given a joint story, the testimony of Mario would have been merely repetitious of that given by Anthony (R. 22a–23a). He then said (R. 23a):

> Now, in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligation to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:
>
> "The Government wins when justice is done its citizens in the court."
>
> Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that juryroom and acquit every one of these defendants.

The court overruled a motion for withdrawal of a juror on that remark (R. 24a).

The Court of Appeals held that the prosecutor's comments on summation constituted no more than a legitimate and proper answer to an argument advanced by defense counsel (R. 117–118).

SUMMARY OF ARGUMENT

I

There was proper joinder, for indictment and trial, of both offenses and defendants in this case. A conspiracy count naming the petitioners jointly was not an indispensable nexus to that joinder since the substantive counts constituted a series of related offenses in which all of the petitioners participated. The failure of the conspiracy count at the trial, therefore, had no bearing on the propriety of the submission of the substantive counts to the jury; they were subject to joinder with or without the conspiracy.

A. The three substantive offenses, charging the petitioners with transporting stolen goods in interstate commerce, were properly joined without the conspiracy count under the Federal Rules of Criminal Procedure and the case law. Considered without regard to the number of defendants, they were subject to joinder on any one of three alternative grounds set forth in Rule 8(a)—as offenses of the same or similar character, or offenses based on transactions connected together, or offenses constituting part of a common scheme or plan.

As to the joinder of defendants, Rule 8(b) permits such joinder if the accused participated either in the

same act or transaction or the same *series* of acts or transactions constituting an offense or offenses. The language and history of Rule 8(b) support the view that its framers adopted the practice of the more liberal judicial decisions in permitting defendants who participated in a series of acts or transactions to be named as separate defendants in separate counts as well as joint defendants in one or more counts. A series of transactions was contemplated as a series of acts or offenses constituting similar criminal activity coupled with connecting factors, such as time or place, or pattern of conduct or plan, which result in the relevancy or dependency of proof as between such acts or offenses. The existence of a conspiracy was not considered a prerequisite to joinder.

The substantive counts in this case alleged a series of transactions. They charged in almost identical language that each of the petitioners, together with the Stracuzzas, violated the same criminal code provision in the same period of time by shipping stolen goods from the same place. The Stracuzza scheme of operation was apparent from the allegations in each count and such scheme was a necessary part of the proof as to each count. Each petitioner was a part of the scheme—a participant in a series of transactions. Each was therefore properly named in a separate count.

The cases decided since the adoption of the Rules have found joinder proper in analogous situations.

B. Even if the dismissal of the conspiracy charge impaired the joinder of the substantive offenses, the petitioners would not, in the absence of a showing of

prejudice, be entitled to reversal. There is no basis for any implication that the conspiracy count was included merely to add propriety to what would otherwise have been improper. The original belief that all the defendants were members of a single conspiracy, although not established at the trial, was not unreasonable under the facts of this case.

Prejudice is the only guidepost for a court in determining the right to relief from misjoinder arising during trial. Rule 14, F.R. Crim. P. Reversal for misjoinder must rest on a showing of prejudice.

There was no prejudice here. The evidence was developed in orderly, systematic fashion so as to be easily followed and readily referable to the defendant to whom it applied. With virtually every offer of proof, an instruction was requested and given that it was admitted with respect to a particular defendant and was not to be considered with respect to others. Since the conspiracy count was dismissed at the end of the government's case, the defendants were not denied an affirmative defense because of a fear that evidence offered as to one could be imputed to the others. The dominant issue as they chose to meet it was a simple one—that of intent.

The court in its charge to the jury made the issues clear, reviewed the evidence separately as to each of the defendants, and admonished the jury to consider the evidence against each defendant separately as it related to him under the particular count under which he was charged. The jury could not have been confused.

II

The requirements of the statute that the aggregate minimum value of the shipped stolen goods *referred to in a single indictment* be $5,000 for the purposes of federal jurisdiction were met in this case. Each count of the indictment, none of which was attacked at any time as duplicitous, alleged that each petitioner transported goods over a period of time. Each petitioner stipulated that the total value of the shipments during the period charged in the count applicable to him was over $5,000, even though the value of each individual shipment was less. The court properly charged the jury that they could rely on the stipulations that the total value shipped in each count was $5,000. We need not consider what would have been the question had there been any attempt to aggregate the values of all the counts. It is clear here that the shipments, so related as properly to form the basis of a single count against each petitioner, have sufficient unity of purpose to justify aggregation under the statute.

The language and legislative history of the statute show that Congress in setting a minimum jurisdictional value did not want the Department of Justice to be burdened with numerous small violations. Congress was not unaware, however, that a serious violator might attempt to avoid federal prosecution by moving a series of single shipments each of which was under the statutory minimum; it thus provided for the aggregation of the values referred to in the indictment. The language of the congressional reports is replete with references to the fact that this proviso authorizes federal jurisdiction in the event that a defendant is

charged with a *series* of violations. The word "series" is significant; it is not the same as a "single plan or agreement." If the acts were sufficiently related so as to justify joinder in one indictment, their values could be aggregated.

The petitioner argues that the Court of Appeals sustained the convictions on the basis of findings of fact made by it which were not submitted to the jury. However, such findings are not necessary to uphold the judgment since the instructions of the trial court were correct in not submitting the question of value to the jury, but itself determining the propriety of adding together the value of the shipments on the basis of the legality of the joinder of transactions in the individual counts.

III

The remarks of the Assistant United States Attorney on summation, made in reply to argument of defense counsel implying that the government had made a deal to color and suppress testimony, were not improper. In spite of provocation, the prosecutor injected no personal protestations in defense of himself, or his witness, that would have confused the issue of innocence or guilt, or that would have placed the prestige of his office on the side of the credibility of the testimony being attacked. He likewise made no personal representations outside the record that could be characterized as unsworn testimony. His remark that the government wins when justice is done, and his admonition that the jury should acquit if it believed the government had concealed the facts, were a legitimate response to the argument made by the defense.

ARGUMENT

I

THERE WAS PROPER JOINDER OF OFFENSES AND DEFENDANTS

The initial issue is whether there was improper joinder of offenses and defendants in one indictment. The petitioners do not contend that the joinder here was improper at the outset of the trial. They argue rather that prejudicial error resulted as a matter of law when the three substantive counts were submitted to the jury after the dismissal of the conspiracy count. This argument, with overtones of variance, is predicated upon the assumption that the conspiracy count was an indispensable "nexus" to the validity of the indictment in the first instance (as the court below thought) and that its dismissal at the close of the prosecution's evidence was fatal to the case, a position which the court below rejected in the absence of a showing of prejudice.

It is our position that the joinder of the three substantive offenses, and the resulting joinder of defendants, was proper initially under the Federal Rules of Criminal Procedure and the case law—with or without the conspiracy count. The submission, therefore, of the three substantive counts to the jury raised no issue of misjoinder, and there is therefore no basis for reversal on that ground. Moreover, there was no showing of prejudice.

Before developing this position, we think it well to clarify one preliminary point which the petitioners discuss (No. 111, Pet. Br. p. 24). The petitioners did

not make a motion for a mistrial after the conspiracy count was dismissed. As noted in the Statement, the petitioners, in arguing for judgment of acquittal on the substantive counts, urged that evidence admitted against one defendant alone would be prejudicial to the others (R. 14a). But what the petitioners were seeking was a judgment of *acquittal,* a judgment that they go free, not that each have a new trial separately. We need not endeavor to decide whether the petitioners would have had a defense of double jeopardy if the trial judge had, on his own motion, decided to grant a new trial at that time because of misjoinder of offenses. It is clear enough that in such event there would have been more of a problem of double jeopardy than if the petitioners had themselves moved for a new trial. The absence of a motion for a new trial is therefore a factor to be considered in determining whether the trial court committed prejudicial error in continuing the trial.

Our basic argument, however, rests not on the petitioners' failure to move for a new trial, but on the propositions that the joinder of offenses was proper in the first instance and that in any event the courts below properly found that there was no prejudice as the result of the joinder.

A. THE SUBSTANTIVE COUNTS COULD PROPERLY HAVE BEEN JOINED IN ONE INDICTMENT IN THE FIRST INSTANCE WITHOUT THE CONSPIRACY COUNT

1. *Joinder of offenses*

There is no question that three or four separate criminal offenses may under certain circumstances properly be charged in one indictment. This is the

literal meaning of Rule 8(a) of the Federal Rules of Criminal Procedure which authorizes the charging in one indictment of two or more offenses in a separate count for each offense "if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

This rule substantially restates what was existing law as to joinder of offenses at the time of its adoption[4]—law which itself restated what had been the practice in the early American and English courts. See *Pointer* v. *United States*, 151 U.S. 396, and cases cited. The rule permits the joinder of felonies or misdemeanors or both. The offenses may be all substantive crimes. *Ibid.*; *Dunaway* v. *United States*, 205 F. 2d 23 (C.A.D.C.). They may be conspiracies and substantive offenses. *Curley* v. *United States*, 160 F. 2d 229 (C.A.D.C.), certiorari denied, 331 U.S. 837; *Pinkerton* v. *United States*, 151 F. 2d 499 (C.A. 5), affirmed, 328 U.S. 640. They may be related conspiracies. *United States* v. *Cohen*, 145 F. 2d 82 (C.A. 2), certiorari denied, 323 U.S. 799; *United States* v.

[4] Section 1024 of the Revised Statutes (18 U.S.C. (1940 ed.) 557, repealed by the Act of June 25, 1948, 62 Stat. 862) provided as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Perlstein, 120 F. 2d 276 (C.A. 3), certiorari denied, 316 U.S. 678; *McNeil* v. *United States*, 85 F. 2d 698 (C.A.D.C.). The only requirement is that they be offenses of the same or similar character (*Pointer* v. *United States, supra*, 151 U.S. 396), or be based on the same act or transaction (*Cataneo* v. *United States*, 167 F. 2d 820 (C.A. 4)), or based on two or more acts or transactions connected together or constituting parts of a common scheme or plan (*Rakes* v. *United States*, 169 F. 2d 739 (C.A. 4), certiorari denied, 335 U.S. 826). In this latter respect the connecting link need not be a conspiracy, or even a scheme. Common factors as to time, place, and occasion may link offenses. See *Pointer* v. *United States*, 151 U.S. 396.

Measured by these principles—and passing for the moment the question of the number of the defendants and the acts performed by each—the offenses here are within the class of crimes subject to permissible joinder, on any one of three alternative bases. The substantive offenses were of the same or similar character. Each count charged a violation of the same criminal code provision prohibiting the transportation in interstate commerce of goods known to be stolen. Moreover, the offenses were based on two or more acts or transactions connected together. The transactions were made with the same party, the Stracuzzas, were carried out in approximately the same period of time, and originated from the same place. Lastly, these offenses were based on transactions constituting parts of a common scheme or plan by the Stracuzzas to sell stolen merchandise at discount rates.

Unquestionably as to the offenses as such, joinder was proper. Thus if the Stracuzzas, who were named

as defendants in each of the substantive counts, had been tried under these three counts, they could not have claimed misjoinder. And since the offenses as such were properly joined, we think that they could properly be tried together even though different defendants were also named in each count.

2. *Joinder of defendants*

Rule 8(b) of the Rules permits the joinder of two or more defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It provides further that such defendants may be charged in one or more counts together or separately and that all of the defendants need not be charged in each count.

Under the literal wording of the Rule, joinder of two or more defendants is contemplated in two types of situations—first, if they participated jointly in one act (or transaction) or, second, if they participated in any one of a series of acts (or transactions). The word "series" implies a connected, but not necessarily an integrated, relationship. There must be some vinculum between the acts which constitute the alleged offenses. But once the connection exists, joinder is proper if the defendants named participated, even separately, in any one of the acts of the series. This interpretation is supported by the history of Rule 8(b), as gleaned from the Notes of the Advisory Committee, and the subsequent development of judicial law.

In contrast to Rule 8(a), Rule 8(b) had no federal statutory heritage. The status of the federal law

on this subject before the adoption of the rule was confused. At common law, defendants who participated in the same offense and in some instances who committed related offenses could be indicted jointly in the same count or counts of an indictment or separately in different indictments at the option of the prosecuting authority. 2 Bishop, *Criminal Procedure* (2d ed. 1913) §§ 463, 473, 474.[1] Thus in *Redman* v. *State*, 1 Blackf. 429 (Indiana), the court sustained an indictment which in separate counts severally charged one defendant with larceny, and another with receiving the stolen goods, knowing them to be stolen. The court noted that the two crimes were of the same nature, required the same plea, the same judgment, and the same quantity of punishment.

In the federal courts, the case of *Pointer* v. *United States*, 151 U.S. 396, noted above p. 23, *supra*, upheld

[1] For the English law on the subject see Chitty (1 Cr. L. 270, 254):

"Several offenders may also, for different offences of the same kind, be in some cases included in the same indictment, the word 'severally' being inserted, which makes it several as to each of them, though the court will, in its discretion, quash the indictment if any material inconvenience appear to rise from the mode in which it is preferred. Thus, it has been holden that four persons may be joined for erecting four inns, which prove to be common nuisances, if the word 'severally' be inserted, though the want of that word will vitiate, and the same rule applies to the keeping of disorderly houses, the same term being inserted. But it seems that to warrant such joinder, the offences must be of the same nature, and such as will admit of the same plea and sentence, or it may operate like a misjoinder in civil proceedings, and be bad upon demurrer, or after a general verdict, in arrest of judgment. In all these cases, however, the charge is several against each individual, and the jury may acquit some, while others are found guilty."

See also *Rex* v. *Kingston*, 8 East 41, 46.

the statutory practice of joining, in different counts of the same indictment, different felonies of the same general nature. The decision in *McElroy* v. *United States*, 164 U.S. 76, was, however, interpreted as casting doubt on the validity of joinder involving more than one defendant. In that case the Court reversed convictions where there had been consolidation of four indictments charging separate offenses totally unrelated to each other—two of arson and two of assault with intent to kill—and where six persons were named in three of the indictments and only three of the six persons were named in the remaining indictment. The Court reaffirmed the general rule of *Pointer*, *supra*, but concluded that "such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them" (164 U.S. at 81).

Following this, in *United States* v. *Dietrich*, 126 Fed. 664 (C.C.D.Neb.), it was pointed out that, while federal law had discountenanced, in *McElroy* v. *United States*, *supra*, the joinder in one indictment of defendants charged in several counts with independent offenses not part of the same transaction or connected together, the question was an open one as to whether two or more defendants could be in the same indictment severally charged with distinct and several offenses of the same time and place, and forming parts of the same transaction. Circuit Judge Van Devanter, speaking for the court, said (126 Fed. at 670):

> Much can be said in support of a practice which, subject to a discretion invested in the

> court to enable it to do justice between the government and the accused, permits two or more defendants to be in separate counts of the same indictment severally charged with distinct and several offenses of the same class and grade, and subject to the same punishment, where the offenses appear to have been committed at the same time and place and to form parts of the same transaction. Under such circumstances the proof in respect to one offense would almost necessarily throw light upon the other or others, and the connection between them would frequently be so close that it would be difficult or impossible to separate the proof of one from the proof of the other or others. * * *

By the time the Rules were adopted, federal decisions generally permitted two or more defendants to be named as joint defendants in a count or counts of an indictment if they had cooperated in the offense or had been under a joint legal duty. *Dillon* v. *United States,* 113 F. 2d 334 (C.A. 8), certiorari denied, 311 U.S. 689; *United States* v. *Interstate Properties,* 153 F. 2d 469 (C.A.D.C.); *Marcus* v. *United States,* 20 F. 2d 454 (C.A. 3). Cooperation was easily found in the case of a scheme or conspiracy, *Sasser* v. *United States,* 29 F. 2d 76 (C.A. 5), certiorari denied *sub nom. Russell* v. *United States,* 279 U.S. 836. Where there was no joint action, some decisions, citing *McElroy* as an authority, prohibited joinder either in the same count or separate counts. *Castellini* v. *United States,* 64 F. 2d 636 (C.A. 6); *DeLuca* v. *United States,* 299 Fed. 741 (C.A. 2). In other circuits the practice was of a much more liberal na-

ture. In the Fifth and Seventh Circuits, for example, defendants who had participated in the same transaction or transactions could be joined in the same indictments as separate defendants in separate counts as well as joint defendants in one or more counts. *United States* v. *Tuffanelli,* 131 F. 2d 890 (C.A. 7), certiorari denied, 318 U.S. 772; *Morris* v. *United States,* 128 F. 2d 912 (C.A. 5), certiorari denied *sub nom. Lacy* v. *United States,* 317 U.S. 661; *Caringella* v. *United States,* 78 F. 2d 563 (C.A. 7); *Todd* v. *United States,* 48 F. 2d 530 (C.A. 5).

There was also respectable authority to the effect that, once it had been determined that the requirements of the joinder and consolidation statute were met (Rev. Stat. 1024, *supra,* p. 23, fn. 4), differences among defendants were not objectionable. *Davis* v. *United States,* 12 F. 2d 253, 256 (C.A. 5), certiorari denied, 271 U.S. 688; *Caringella* v. *United States,* 78 F. 2d 563, 567 (C.A. 7); *United States* v. *Smith,* 112 F. 2d 83 (C.A. 2); *Firotto* v. *United States,* 124 F. 2d 532, 535 (C.A. 8). (See also the opinion of Judge Learned Hand in *United States* v. *Liss,* 137 F. 2d 995 (C.A. 2), certiorari denied, 320 U.S. 773, where it was observed that the language of the joinder of offenses statute (18 U.S.C. 557, p. 23, *supra*) presupposed that transactions might be independent of each other and that the mere fact that the accused were different in two counts was no longer important despite what was said in *McElroy.*)

It was the more liberal practice that the Federal Rules of Criminal Procedure adopted. The Notes of the Advisory Committee (see Second Preliminary

Draft, p. 37) quoted with approval the language of Judge Van Devanter (*supra*, pp. 27–28) in *United States* v. *Dietrich*, *supra*, and stated that the rule would now permit joinder in the instance illustrated by that decision (separate offenses charging one defendant with agreeing to receive a bribe and another with agreeing to give such bribe). See also *United States* v. *Geare*, 293 Fed. 997 (C.A.D.C.). The Advisory Committee used this illustration (*ibid.* at p. 36): "The rule would permit defendants A and B, after participating in * * * offenses as described * * * to be charged in the same indictment in the manner indicating their respective participation, as follows:

* * * * *

(2) In an indictment containing more than one count:

* * * * *

(b) In Count 1, A may be charged separately, in Count 2, B may be charged separately, and in Count 3, A and B may be charged together (and other defendants also may be joined).

The Notes state that the provision permitting the joinder of defendants who are charged with offenses based on the same series of acts or transactions "is based on the present law" (*ibid.*, p. 37), and cases are cited as illustrative of this law. We may look therefore to these cases to determine the meaning of a series of acts or transactions (as used in Rule 8(b)). From these, it is evident that the Advisory Committee intended to apply the more liberal rule.

In *United States* v. *Tuffanelli*, 131 F. 2d 890, 894 (C.A. 7), the substantive counts of an indictment

(nolle prossed as to some of several defendants on trial) charging distinct violations of federal liquor laws were characterized by the court as "counts [which] charged closely related offenses, based upon a series of transactions constituting a preconceived system and plan to defraud the United States of the revenue imposed on distilled liquor." In *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811, two counts which charged four defendants jointly with distinct offenses of illegal concealment and transportation of separate quantities of morphine were characterized as a charge which "results from the same series of acts." And in *Todd* v. *United States*, 48 F. 2d 530, 532 (C.A. 5), the court found "one series of transactions" in an indictment which charged two men in three substantive counts with separate allegations of unlawful possession of liquor on the same day and place, and jointly with unlawful maintenance of a common nuisance, a building where alcohol was illegally kept in the same city and on the same day. In *Firotto* v. *United States*, 124 F. 2d 532, 535 (C.A. 8), the court found that acts and transactions involving possession and sale of counterfeit notes participated in by various defendants during a fairly definite period of time and alleged in three indictments (only one of which included a conspiracy count) were "connected together" so as to permit the consolidation of the indictments for trial. See also *United States* v. *Smith*, 112 F. 2d 83 (C.A. 2), approving the consolidation for trial of crimes of the "same class" alleged in four indictments, one charging a conspiracy, the other substantive offenses relating to the

importation, harboring, transportation and maintaining for purposes of prostitution, of alien girls in the United States, and *Morgan* v. *United States*, 98 F. 2d 473 (C.A. 8), certiorari denied, 305 U.S. 648, finding proper joinder of two defendants "closely associated" in transactions alleged in a seven count indictment for mail fraud.

These cases confirm that there is a series of transactions within the purview of Rule 8(b) if there is similarity of the criminal activity alleged in each transaction, coupled with factors which imply the relevancy or dependency of the proof as between transactions. A connecting factor may be closeness of time or place, or it may be a pattern of conduct or plan conceived by one or more, but not necessarily all, of the defendants. In this last example, it is necessary only that a defendant should have participated in one or more of the transactions forming a part of the plan or pattern to be subject to joinder. It is important to note that at least three of the cases reviewed by the framers of the Rules did not contain conspiracy counts; in not one instance did the existence or nonexistence of a conspiracy have a bearing on joinder.

For these reasons, we think that the court below, while correct in finding that the petitioners were properly joined as defendants, was nevertheless in error when it concluded that this joinder was proper only because of the conspiracy count (R. 112). For if the substantive counts comprise a series of acts or transactions, it follows that the petitioners who participated in any *one* of the members of the series could

be named in the same indictment in a count charging that member.

We think it clear that the substantive counts did allege a series of transactions. As noted above, pp. 4–5, *supra*, the substantive counts alleged in almost identical language and pattern that petitioners Max Schaffer, Norman Schaffer, Benjamin Marco and Hyman Karp transported, together with the Stracuzzas, in interstate commerce goods known to have been stolen, as follows:

Count 1—Stracuzzas, Schaffers..... violation of 18 U.S.C. 2314, 2.
Count 2—Stracuzzas, Marco..... violation of 18 U.S.C. 2314, 2.
Count 3—Stracuzzas, Karp..... violation of 18 U.S.C. 2314, 2.

On the face of the indictment, the offenses were recognizable as part of a pre-conceived plan. This is apparent from the allegations revealing the defendants Stracuzzas in New York which are common to each count, the reiteration in each offense of the shipments of stolen goods all originating in New York at about the same time and all ending on the same date. The Stracuzza scheme of operation was a necessary part of the proof as to each substantive count. While we do not quarrel with the district court's holding that this central nexus did not involve all the defendants in a single conspiracy, we think it was enough of a nexus to fall within the purview of Rule 8(b) and permit the joint trial of these defendants on separate substantive charges. Compare the rationale of the cases discussing the practicality of joinder of offenses charging theft of goods and receipt or possession of the same goods with guilty knowledge. *Caringella* v. *United States*, *supra*, 78 F. 2d 563 (C.A. 7); *Davis* v. *United States*, *supra*, 12 F. 2d

253 (C.A. 5), certiorari denied, 271 U.S. 688; *Redman* v. *State, supra,* 1 Blackf. 429 (Indiana); *Commonwealth* v. *Darling,* 129 Mass. 112.

The cases decided since the adoption of the Rules confirm that Rule 8(b) authorizes joinder in analogous circumstances—significantly, in factual situations where there is an absence on an overall conspiracy. Thus in *United States* v. *Rosenfeld,* 235 F. 2d 544 (C.A. 7), certiorari denied, 352 U.S. 928, one six count indictment charged a contractor and his salesmen with wilful misrepresentations to a federal agency and individual conspiracies to defraud the United States, as follows:

Count 1—C & Ros	18 U.S.C. 1010.
Count 2—C & Ros	18 U.S.C. 371.
Count 3—C & W	18 U.S.C. 1010.
Count 4—C & W	18 U.S.C. 371.
Count 5—C & Rob	18 U.S.C. 1010
Count 6—C & Rob	18 U.S.C. 371.

Salesman Rosenfeld, convicted on count 2, urged on appeal error in joinder (counts 3 and 4 were severed for trial). The Court of Appeals for the Seventh Circuit held that Rule 8(b) was a standing refutation of such an argument, saying "a clearly discernible pattern of action involving Cutter and his salesmen is traceable from the face of this record." 235 F. 2d at 545.

And in *Scheve* v. *United States,* 184 F. 2d 695 (C.A. D.C.), a three-count indictment charged gambling and assault offenses as follows:

Count 1—TS, JS, K, R	Keeping gaming table.
Count 2—JS	Assault with intent to kill.
Count 3—JS	Assault with dangerous weapon.

The Court of Appeals for the District of Columbia found no error in a denial of severance under circum-

stances where the assault, made upon the person of one losing at the gaming tables, grew out of an altercation arising because of a demand for return of losses by the victim's wife. The court found that the gambling and the assault were a "series of acts or transactions" under Rule 8(b), "in which series, if not in each of its members, all four defendants participated." It noted that there was such close connection as to time, place, and occasion that it would have been difficult, if not impossible, to separate proof of one charge from the proof of the other.

In *Ross* v. *United States*, 197 F. 2d 660 (C.A. 6), certiorari denied, 344 U.S. 832, the Court of Appeals for the Sixth Circuit found no error in the denial of a motion to elect, filed by two defendants who were tried jointly with another defendant for making false statements in loan transactions under an indictment including certain substantive counts upon which the two defendants had been acquitted previously and the third was still charged. The court noted that there was a "close relationship" among the transactions in the several counts.

See also *United States* v. *Antonelli Fireworks Co., Inc.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *Vaughn* v. *United States*, decided October 27, 1959 (C.A. 5), certiorari denied, February 23, 1960 (No. 624, this Term); *Griffin* v. *United States*, 272 F. 2d 801 (C.A. 5); *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5), certiorari denied, 355 U.S. 935; *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502 (C.A. 2), certiorari denied, 352 U.S. 969.

The petitioners' reliance upon the case of *McElroy* v. *United States*, decided before the adoption of the Federal Rules of Criminal Procedure and before the passage of the harmless error statute,* is misplaced. As noted above, p. 27, the offenses there charged—two of arson of two different dwellings and two of assault with intent to kill two different persons—were totally unrelated. It was for this reason that *McElroy* was distinguished in the vast majority of cases involving the joinder of defendants arising before the adoption of the Rules. See, *e.g.*, *United States* v. *Tuffanelli*, *supra*; *United States* v. *Smith*, *supra*; *Morris* v. *United States*, 12 F. 2d 727 (C.A. 9); cf. *Castellini* v. *United States*, 64 F. 2d 636 (C.A. 6). For the same reason *McElroy* has since been distinguished in practically all the cases arising since the adoption of the Rules. See *United States* v. *Rosenfeld*, *supra*; *Scheve* v. *United States*, *supra*; *Ross* v. *United States*, *supra*.

The case of *Kotteakos* v. *United States*, 328 U.S. 750, also relied upon by petitioners, is likewise inapposite. As the court below noted, in addition to the distinguishing factor that that case involved a large number of defendants tried jointly, there was the problem of variance brought about because the indictment charged, and the court gave instructions pertinent to, one huge conspiracy, while the evidence developed that there were in fact some eight separate conspiracies. The result in *Kotteakos* might well have been different had the indictment charged eight

* Sec. 269 of the Judicial Code, as amended (28 U.S.C. (1946 ed.) 391), Act of February 26, 1919, c. 48, 40 Stat. 1181.

closely related conspiracies, connected by the participation of the central figure, and had the evidence been developed, and the jury adequately instructed, in such manner as to protect each individual defendant against the danger of being held responsible for acts of the others. In any event, we have no such problem in the instant case. Here the conspiracy count failed, but the three properly-joined substantive counts, meeting the requirement of Rule 8(b), went to the jury with proper instructions. There was no danger of the *en masse* treatment condemned by *Kotteakos*.

In this case there were three defendants (treating the Schaffers, who acted together, as one), each separately charged. Each defendant was a part, even though separate, of a scheme which had a common center—the operations of the Stracuzzas to deal in stolen merchandise. The central facts of the scheme were the same as to each, and had to be proved in each case. The separate question as to each was his own intent, a matter easily separated out of the general scheme. As we understand the purpose of the Advisory Committee, this is the kind of situation in which it was intended to permit joinder under Rule 8(b) even though the defendants would be separately charged.

B. THERE WAS NO PREJUDICE RESULTING FROM THE JOINDER

1. *Reversal may be predicated only on a finding of prejudice.*

Although we believe that the substantive counts standing alone were properly joined, even if this were

not so, the petitioners would not, in the absence of a showing of prejudice, be entitled to reversal. Given proper joinder at the outset of trial—which the petitioners concede, by virtue of the conspiracy count—misjoinder arising because of the failure of the conspiracy count at the time of the submission of the case to the jury would be ground for reversal only if the petitioners had been prejudiced thereby. This is what the court below correctly held.

Prejudice is the only guidepost for the court in determining the right to relief for misjoinder arising during trial. In the earliest federal case supporting the propriety of joinder of different felonies under proper safeguards, *Pointer* v. *United States, supra,* 151 U.S. 396, this Court said at p. 403:

> The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. * * * [T]hat section [Rev. Stat. Sec. 1024] is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarassed in his defence, if that course be not pursued.

See also *Pierce* v. *United States,* 160 U.S. 355; *United States* v. *Ball,* 163 U.S. 662, 673; *Stilson* v. *United States,* 250 U.S. 583.

The principle there announced has been the guiding consideration for courts which have since been called upon to decide questions of alleged abuse of discretion in denying relief from misjoinder. *Dunaway* v. *United States*, 205 F. 2d 23 (C.A.D.C.); *Morris* v. *United States*, 128 F. 2d 912 (C.A. 5); *United States* v. *Perlstein*, 120 F. 2d 276, 281 (C.A. 3); *United States* v. *Lotsch*, 102 F. 2d 35, 36 (C.A. 2), certiorari denied, 307 U.S. 622. It is incorporated in Rule 14 of the Federal Rules of Criminal Procedure which authorizes the court to exercise its discretion to grant relief from misjoinder "[I]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together * * *." *Supra*, p. 3.

Even where one conspiracy has been charged, and several proved, this Court has held that reversal is not automatically required, but that the issue must be considered in relation to the whole trial. *Berger* v. *United States*, 295 U.S. 78, a decision which this Court in *Kotteakos* v. *United States*, 328 U.S. 750, did not overrule, but merely held inapplicable to the different facts presented in *Kotteakos*. See also *United States* v. *Liss*, 137 F. 2d 995 (C.A. 2), certiorari denied, 320 U.S. 773; *United States* v. *Rosenberg*, 150 F. 2d 788, 793 (C.A. 2), certiorari denied, 326 U.S. 752. This is so even though, where one conspiracy count is submitted to the jury, there is necessarily a charge that the acts of one defendant are held attributable to all. Where, as here, the conspiracy count is not submitted to the jury, and the jury is explicitly instructed that guilt must be found only on the evidence relating to a

particular defendant, it is clear that reversal for misjoinder must depend on a finding of prejudice.

The government does not, as the petitioners seem to think (No. 111, Pet. Br. 26), argue that the district court was wrong in finding that one general conspiracy was not proved. All that we say is that, on this record, there is no basis for any implication that the conspiracy count was included merely to make possible what would have otherwise been an improper joinder. In the first place, as discussed above, we think the joinder was proper whether or not there was a conspiracy count. And even if that were not so, the belief that all defendants were members of a single conspiracy, although not established at the trial, was not so wholly unreasonable as to justify an implication of bad faith. There is no doubt that the Stracuzzas themselves were in one general conspiracy to deal in stolen goods. There is also no doubt that conspirators can be held liable as members of a single conspiracy, even though they serve different functions in the conspiracy and do not know each other. *Blumenthal* v. *United States*, 332 U.S. 539. And so, as to some illegal enterprises, such as narcotics rings, it has been held that different buyers from the same source are sufficiently dependent on the operation of an illegal ring that they may be joined as conspirators even though they did not know each other and were not in any direct relationship. *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863. The district court found that such was not the situation here; that none of the petitioners had a sufficient stake in the whole venture to justify finding them a

part of the whole general conspiracy. But the lines are difficult to draw and a prosecutor cannot be accused of bad faith because he thought this case fell within the "ring" rather than the *Kotteakos* rationale.

The sole question which this case presents on this point, therefore, is whether on this record the joinder of the separate substantive offenses prejudiced petitioners.

2. *The rights of the petitioners were fully protected*

A review of the record reveals that the petitioners could not have been prejudiced by the joinder at the trial. The evidence was developed in orderly fashion, and was easily followed. In the testimony of "Tony" Stracuzza, the "fence" and the one witness common to all of the petitioners, great care was taken to describe the transactions which he had with each retailer separately and in turn (see R. 46–78). As to the other witnesses (with one minor exception), they were called systematically in groups that focused attention on each particular defendant, first against Max Schaffer, then Norman Schaffer, then Benjamin Marco and finally Hyman Karp (See Tr. 879–990, 991–1107, 1108–1205). As the court below noted, with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be considered with respect to any other defendant.[7] Neither was this danger at all likely, since the proof

[7] See *e.g.* Tr. 384, 440, 454, 882, 899, 911, 960–961, 993, 1012, 1037–1038, 1054, 1109, 1123, 1133, 1148. The Court of Appeals notes that over fifty such requests and instructions were given (R. 113).

against one defendant in no way implicated another. The main issue—crystallized by the petitioners' defenses—was a simple one, *i.e.*, whether they had knowledge of the stolen character of the goods. The evidence developed to show this guilty knowledge was peculiar to the particular defendant with which it was concerned. Thus the motion picture showing Max Schaffer in the Stracuzza showroom could not have incriminated the other petitioners. This is likewise true with respect to the testimony of Mr. Marco's employees concerning the removal of labels from garments, the testimony that Mr. Karp telephoned Mr. Stracuzza about protection, and the testimony regarding admissions or statements made by the separate defendants. As to the question of whether one of the petitioners could have been prejudiced by imputing to him the *mens rea* of the others, the comment of Judge Learned Hand in *United States* v. *Liss*, *supra*, 137 F. 2d at 999, is pertinent: "* * * if we are to clutch at such shadows, the criminal prosecution of complicated crime becomes impossible, and the phantom of the innocent man convicted will prevent any effective enforcement of the law."

The joint trial of the defendants did not keep any one of them from putting in any defense he might have had. The remarks of the trial judge that the defendants could put in their case at their peril (see No. 111, Pet. Br. 33) were, as we read the record, made with respect to the court's ruling on the "aggregate value" question, that further proof on that issue would be perilous. But even if this was intended more generally, this is not different from the situation in which

any defendant finds himself when his motion for judgment of acquittal is denied. He must decide whether to rest on what he deems the failure of the government's proof or put on a case with the possibility that his defense may actually bolster the government's case. Since the trial judge had dismissed the conspiracy counts before the defendants were to put on their case, they could not have been under any impression that evidence offered as to one would be allowed to be imputed to the others.

The court's charge to the jury (characterized by one defense counsel as extremely fair, R. 62a) not only reviewed the evidence separately as to each defendant, but admonished that the jury was required to consider the evidence against each defendant separately and as it related to him under the particular count under which he was charged (R. 50a). Naming each defendant separately and in order, the court reviewed the proof which the government relied upon to show guilty knowledge, and in turn recapitulated each separate argument relied upon by each defendant to refute such knowledge (R. 55a–58a). It is true, as the petitioners state (No. 111, Pet. Br. p. 34), that at one point the judge treated together evidence "as against all the defendants." But this was simply because the same evidence, as to how the Stracuzzas operated, had to be shown as to all the defendants and was admissible against all the defendants. The fact that the judge specifically said that this evidence applied against all the defendants, whereas other evidence did not, shows how very careful he was to make the issues clear. Under the circum-

stances in which the evidence was developed, the jury could not have been confused.

There is no reason for speculating that the jury might have, in disregard of cautionary instructions, found guilt as to one defendant on the basis of evidence applicable to another. See *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348 U.S. 84; *Blumenthal* v. *United States*, 332 U.S. 539. As this Court said in *Delli Paoli* v. *United States*, *supra*, 352 U.S. at 242:

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. * * *

II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT UNDER THE STATUTE IT COULD ADD TOGETHER THE VALUE OF ALL SHIPMENTS ALLEGED IN EACH COUNT IN DETERMINING WHETHER THE JURISDICTIONAL AMOUNT WAS REACHED

As to each petitioner, the indictment alleged in a single count that for a period of several months he and the Stracuzzas transported and caused the transportation of merchandise known to have been stolen. It was never at any time suggested that any single count was duplicitous as covering several distinct offenses. It was stipulated that the total of the mer-

chandise, shipped to each petitioner during the period charged in that single count, was over $5,000, even though each individual shipment was less. The trial court charged the jury that they could rely on the stipulations that the total shipped in the period charged in each count was over $5,000 (R. 58a).

It is the government's view that the charge of the trial court was correct under the statute. In brief, our position is that, if more than one shipment can properly form the basis of a single count, *ipso facto*, they have sufficient unity of purpose to justify aggregation under the statute. Whatever may be the situation where shipments charged in separate counts must be totaled to form the necessary $5,000, it seems that it was the intent of Congress that, where shipments have enough of a relationship so that they can be properly charged as a single offense, there is a violation of the federal statute. The court, therefore, properly rejected petitioners' request to charge that the jury had to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement.

A. THE LANGUAGE

Section 2314 of Title 18 U.S.C. (62 Stat. 806, as amended by 63 Stat. 96) (pp. 2–3, *supra*) provides a penalty for transporting

> * * * in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen * * *.

The term "value" is defined in Section 2311 in pertinent part:

> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a *single indictment* shall constitute the value thereof. [Emphasis added.]

The statute states that when any shipments of goods, etc. are so related as to be properly charged against a shipper in the same *indictment,* whether in the same or separate counts, it is the total value of such shipments which determines whether the shipper is subject to prosecution under the statute. The literal language of the statute goes far beyond the position necessary to sustain the trial judge's charge here. Under the literal language, if offenses may properly be joined in one indictment, the totality of shipments represented by such offenses may be aggregated to make up the $5,000. Considering the present liberality of rules for joinder, such a literal reading of the statute would go very far. The trial judge believed there could be serious doubt of the application of the literal language if, in this case, there had been any attempt to lump together the shipments made to the different defendants. That problem is not here. There seems no doubt that a sufficient relationship to meet the requirements of the statute is established by the very fact that the transaction is covered in a single count, and no claim is made that such count is duplicitous.

That Congress contemplated, at the very most, a loose relationship in order to justify aggregation, and that it did not require a "single plan or agreement" is shown by the legislative history of these code provisions which had their genesis in the National Stolen Property Act of 1934 (48 Stat. 794, 18 U.S.C. (1940 ed.) 413–419). Section 3 of that Act provided punishment for transporting or causing

> * * * to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen * * *, knowing the same to have been so stolen * * *.

And Section 5 of the Act provided:

> In the event that a defendant is charged in the same indictment with *two or more violations* of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof. [Emphasis added.]

"Two or more violations" is not language which connotes a single plan or conspiracy.

The Congressional purpose in setting the $5,000 minimum is stated in House Report No. 1462, 73d Cong., 2d Sess. (1934), p. 2, which accompanied S. 2845:

> * * * There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.

> It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

The same report states:

> As reported by your committee, the jurisdiction of the federal government is limited to cases in which the value of the stolen property is $5,000 or more * * *. *There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.* [Emphasis added.]

Conference Report No. 1559, 73d Cong., 2d Sess. (1934), p. 3, contains a like expression:

> The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment.

In 1939, the statute was broadened to include embezzled property. House Report No. 422, 76th Cong., 1st Sess., pp. 1–2, made the following comment as to the value requirement:

> It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of

violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

The purpose of this part of the statute is evident. Congress did not wish the Department of Justice to be burdened with numerous small violations. But Congress also wanted to make certain that a violator would not be able to be free of federal control by taking advantage of the $5,000 minimum as to shipment. We think that the use of the word "series" is significant. A "series" is not the same as a "single plan or agreement." Acts may be in series even though they are disconnected. It was the evident thought of Congress that a habitual offender should be subject to federal jurisdiction and that, if acts had a sufficient relationship to warrant joinder of offenses in one indictment, that was enough of a connection to justify aggregation of the amounts so as to meet the minimum required for federal jurisdiction. It may be that, where a number of different counts are charged against an individual, a jury ought to be told that it must find the counts sufficiently related to constitute a series of acts before it can aggregate.[8] Or it may be that, to render the literal language inapplicable, a defendant would have to move to have counts dropped for misjoinder on the ground that the offenses joined in one indictment were too unrelated to warrant joinder.

[8] We see no basis for requiring a finding of a single plan or agreement as suggested in *Andrews* v. *United States*, 103 F. 2d 511, 514 (C.A. 4), even if, as that decision suggests, totally unconnected shipments cannot be aggregated. Between total disconnection and a "single plan or agreement" there could be many factual patterns which would amount to a "series" of transactions.

Whatever problems that situation may present, this case does not raise.

Here, all shipments of a particular defendant were charged in one count. No claim was made or could be made that the count is duplicitous. The language of each count contemplated proof of continuous shipments made by each petitioner—shipments of the same kind of goods having the same origin and destination, taking place during a period of some two and a half months, and having a total value in excess of $5,000. The propriety of charging this series of shipments in one count was shown by the proof that the shipments were made according to a pre-arranged agreement between the Stracuzzas and each of the petitioners—which contemplated continuous shipments, at specified discounts, of specified types of goods.* But the legal propriety of each count in charging transactions covering a span of time is not a jury issue and the judge properly refused to refer it to the jury. Both the language of the statute and its legislative history support the theory on which the case went to the jury—that shipments charged in a single count may be aggregated for the purposes of federal jurisdiction.

Since we assert that the basis of decision adopted by the trial court was correct, it is not necessary to meet the petitioners' argument that the court below upheld the conviction on the basis of findings of

* We read the reference to this fact in the opinion below as merely spelling out that closeness of relationship that, without question, gave the shipments unity for purposes of the statute. Its opinion represents no improper fact-finding (Pet. Br. No. 111, p. 35) or departure from the theory of conviction (Pet. Br. No. 111, p. 40), as alleged by petitioners.

fact which were not submitted to the jury. Cf. *Grunewald* v. *United States*, 353 U.S. 391. We urge that the findings, if such they can be called, of the Court of Appeals are unnecessary to sustain the conviction so that there is no necessity for a new trial to permit a jury to pass upon factual issues which are not necessary to the decision.

III

THE PROSECUTOR'S SUMMATION WAS PROPER

Petitioners Karp and Marco urge that comments of the Assistant United States Attorney in summation, admittedly invited by the argument of defense counsel, were so improper as to deprive them of a fair trial (see the Statement *supra*, pp. 12–15). A reading of the arguments to the jury, however, show that the remarks complained of constituted a legitimate response to defense counsel's charges.

1. These petitioners argue (Pet. Br. No. 122, p. 15) that government counsel by his comments was "tendering" to the jury the false issue of his own integrity, as a substitute for the real issue of the defendants' guilt. This is precisely what the remarks of government counsel did *not* do. It was defense counsel who attempted to raise the issue of the integrity of the prosecutor by implicitly suggesting that he had made a deal with the government's main witness to testify in return for favored treatment for himself, his wife, Dorothy, and his brother Marie—a deal which allegedly contemplated that the wife and brother not be called to testify. Government counsel scrupulously avoided personal protestations of his innocence of un-

ethical conduct which might becloud the only issue with which the jury was concerned—that of innocence or guilt of the defendants. His reply was a brief statement that his job was not to convict, that the government wins when justice is done, and that if the jury believed that the government had concealed the true facts, it had the duty to acquit. The court below properly characterized the reply as demonstrating "a commendable candor and sense of fair play."

In this respect the conduct of the Assistant United States Attorney was different from that of the prosecutor in the case of *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2), who, provoked by a similar argument made by defense counsel, replied, 258 F. 2d at 342: "I have been in this office for two and a half years and I am going to leave shortly. I have never made a deal with anybody." And we think it significant that the same court in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, distinguished *Spangelet*, finding that government counsel was well within his rights in stating that he would never engage in unfair tactics, in reply to the argument of defense counsel that two government employees had framed the defendants, that the United States Attorney had no choice but to prosecute the defendants, and that he himself did not believe the witness.

Moreover, the remarks of the Assistant United States Attorney here were of a general nature, expressing no personal opinions. The petitioners have no ground to claim that he was bolstering, by his personal prestige, the credibility of the testimony under

attack. This was the claim made in *Lawn* v. *United States,* 355 U.S. 339, where government counsel vouched for certain witnesses "because we think they are telling the truth". Even in this situation this Court rejected the claim, noting that the court's charge had instructed careful scrutiny of the testimony of the witnesses (as in the instant case, R. 60a), and that the prosecutor's remarks had been prompted by defense counsel's argument among other things that the United States Attorney and his assistant had been "instructed" in a case "instituted in bad faith." The court said at 355 U.S. 359–360, fn. 15, "These comments clearly invited the reply which petitioner Lawn now attacks. Cf. *Gridley* v. *United States,* 44 F. 2d 716, 739; *United States* v. *Battiato,* 204 F. 2d 717." For other instances of comparable "invitations", see *Christensen* v. *United States,* 16 F. 2d 29 (C.A. 9); *Malone* v. *United States,* 94 F. 2d 281 (C.A. 7), certiorari denied, 304 U.S. 562; *Hagans* v. *United States,* 261 F. 2d 924 (C.A. 5), certiorari denied, 359 U.S. 967; *United States* v. *Stromberg, supra.*

The petitioners likewise have no basis for complaining that the remarks in any way constituted unsworn testimony as to guilt. This type of claim was made in *Henderson* v. *United States,* 218 F. 2d 14, 19, 21 (C.A. 6), certiorari denied, 349 U.S. 920, where the prosecutor made unprovoked, strong remarks indicating his belief that the defendant was guilty and that if "I don't believe he is guilty no one is going to make me stand here and prosecute him * * *." Here again it was held that it was not misconduct on the part of the prosecutor to express his individual belief

that the accused was guilty if it was based solely on the evidence introduced and the jury was not led to believe there was other evidence known only to the prosecutor.

2. The petitioners also contend that the Assistant United States Attorney improperly represented that Mario Stracuzza had nothing to contribute to the evidence that would not be cumulative of the testimony of Anthony Stracuzza (Pet. Br. No. 122, p. 12). This would be a valid argument if government counsel professed to speak of his own personal knowledge so as to be in effect testifying without being sworn. See *Lawn* v. *United States, supra; United States* v. *Tucker,* 267 F. 2d 212 (C.A. 3) (discussed in petitioner's brief (No. 122) at pp. 19–20). But here government counsel was not professing to speak of his own personal knowledge as to facts not of record. He specifically referred to the sworn testimony of an F.B.I. agent that both Stracuzzas gave a joint story, and it was upon this testimony, offered in the regular course of the trial, that his statement was properly based.

3. Nothing about the remarks complained of emerges as improper. The federal cases upon which petitioners rely are inapposite. In *Berger* v. *United States,* 295 U.S. 78, and *Pierce* v. *United States,* 86 F. 2d 949 (C.A. 6), the circumstances complained of were unprovoked, pronounced and persistent misconduct having a cumulative effect, including misstated and assumed prejudicial facts, and insinuations of prior complicity in wrongdoing or crime on the part of the defendants. As noted above, *United States* v.

Spangelet, 258 F. 2d 338, condemned statements which amounted to unsworn testimony. See also *People* v. *Lovello,* 1 N.Y. 2d 436, 154 N.Y.S. 2d 8, 136 N.E. 2d 483. This is likewise true of *United States* v. *Tucker,* 267 F. 2d 212, 214 (C.A. 3), where the court characterized representations as to the magnitude of criminal activity not charged as "the plainest misuse of final argument to introduce prejudicial new evidence from the lips of the prosecutor himself, though he was not under oath and not subject to cross-examination." *Nalls* v. *United States,* 240 F. 2d 707 (C.A. 5), and *Snipes* v. *United States,* 230 F. 2d 165 (C.A. 6), involved unprovoked, volunteered statements that the government had other witnesses it was not using because their testimony would merely be corroborative, and that the government could have charged the defendant with 30 or 40 counts in an indictment.

The record here justifies the conclusion that defense counsel was employing the tactics of which he has accused the government. Thus, even now, the greater portion of the brief in No. 122 is devoted to justifying his own advocacy by reliance on facts not a part of the record, and renewing arguments that a deal had been reached and the petitioners' defenses thwarted. (see Brief, pp. 9, 13). The remarks of Mr. Justice Frankfurter dissenting in *In re Sawyer,* 360 U.S. 622, 667, are applicable here:

> To be sure, a prosecutor carries a somewhat heavier responsibility in the maintenance of the standards of criminal justice than does counsel for the defense. But the difference in responsibility is surely not so vast that counsel for

defense has a constitutionally guarded freedom to conduct himself as this petitioner has been found to do, when that same conduct would bring condign punishment for the prosecutor.

CONCLUSION

It is respectfully submitted that the judgments below should be affirmed.

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